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# SERVICE OF UNITED STATES PROCESS IN RUSSIA UNDER RULE 4(F) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Tatyana Gidirimski

*Abstract:* When a potential Russian defendant is not present and cannot be served within the United States, U.S. litigants may be faced with the necessity of carrying out service of process in Russia. If the suit is brought in a U.S. district court, Rule 4(f) of the Federal Rules of Civil Procedure will govern service of process. Although Rule 4(f) provides a number of options for service of process abroad, only two of these options can be used to serve process in Russia. First, service may be done through a letter of request. In fact, Russian law requires foreign service of process to arrive in Russia only by means of letters of request through diplomatic channels. Despite delays caused by the cumbersome procedure for passing letters of request to the appropriate court, experience shows that it can be done. Second, U.S. plaintiffs can ask a federal court to direct service in Russia by other means, which are open to the discretion of the court. This method is highly useful if the defendant has assets in the United States and subsequent enforcement of the judgment in Russia will not be required. If, however, enforcement is necessary, service by means of a letter of request is a better alternative because Russian courts can refuse to enforce a judgment where service did not comply with Russian law.

## I. INTRODUCTION

As Russia<sup>1</sup> continues to be an attractive target for Western trade and investments,<sup>2</sup> interactions between American and Russian counterparts increase, and so does the likelihood of lawsuits. From the standpoint of U.S. litigants, the necessity of serving process in Russia may arise when a potential Russian defendant is not present within the United States and cannot be served within its borders.<sup>3</sup> In an action brought in a U.S. federal court, Rule 4(f) of Federal Rules of Civil Procedure governs service of process abroad, providing a number of options for service.<sup>4</sup> This Comment explores what options are available to U.S. litigants attempting to carry out service of process in Russia.<sup>5</sup> Part II provides an overview of service of

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<sup>1</sup> For the sake of simplicity, this Comment will use the word "Russia" to denote both the Soviet Union before its break-up and the Russian Federation as it now exists.

<sup>2</sup> Daniel J. McCarthy et al., *Russia's Retreat to Statization and the Implications for Business; the Russian economy in the 1990s and the implications for Western business in Russia*, J. WORLD BUS. Sept. 22, 2000, available at LEXIS, News Group File, All.

<sup>3</sup> See *infra* Part II.B; GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 763 (3d ed. 1996).

<sup>4</sup> FED. R. CIV. P. 4(f).

<sup>5</sup> Service of the Russian government and its agencies and instrumentalities, governed by the Foreign Sovereign Immunities Act, is beyond the scope of this Comment.

process rules in both the United States and Russia and examines the so-called Moscow Agreement governing the execution of letters of request between the United States and Russia. Part III argues that the Moscow Agreement cannot be used as an "internationally agreed means" under Rule 4(f)(1). Because no other agreements dealing with service of process between the United States and Russia exist, Rule 4(f)(1) is inapplicable to service of process in Russia. Part IV suggests that out of the several methods of service allowed by Rule 4(f)(2), only service by means of letters of request, prescribed by Rule 4(f)(2)(B), is a viable option. Part V shows that under Rule 4(f)(3), a court may direct service in Russia by methods other than letters of request upon a showing that the plaintiff made a diligent effort to serve process in compliance with Russian law.

Ultimately, therefore, only two alternatives for service of process in Russia exist: service by means of a letter of request under Rule 4(f)(2)(B) and service as directed by a district court under Rule 4(f)(3). Because letters of request may take a long time to complete, Rule 4(f)(3) provides a highly useful alternative, as long as the defendant has assets in the United States and no enforcement of the judgment in Russia will be necessary. On the other hand, if enforcement in Russia is necessary, service by a letter of request is a better method, because Russian courts can refuse to enforce a judgment if service did not comply with Russian law.

## II. AN OVERVIEW OF SERVICE OF PROCESS RULES IN AND BETWEEN THE UNITED STATES AND RUSSIA

### A. *Domestic Service of Process in the United States Under Rules 4(e) and 4(h) of the Federal Rules of Civil Procedure*

In U.S. cases involving only domestic parties, service of process is a relatively simple task. Rule 4(e)(1) of the Federal Rules of Civil Procedure allows personal delivery of the summons and the complaint to the defendant or to the defendant's residence, or delivery of a copy of the summons and the complaint to the defendant's agent.<sup>6</sup> Alternatively, Rule 4(e)(1) provides for service pursuant to the law of the state in which the federal court is located, or where service is effected.<sup>7</sup> Most states conveniently allow service of process by mail, although some states narrow the circumstances

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<sup>6</sup> FED. R. CIV. P. 4(e)(2).

<sup>7</sup> FED. R. CIV. P. 4(e)(1). All U.S. states allow service of process by personal delivery. BORN, *supra* note 3, at 764.

under which plaintiffs may utilize it.<sup>8</sup> Rule 4(d) encourages plaintiffs to use first-class mail to notify defendants about the action and to request a waiver of formal service.<sup>9</sup> In addition, plaintiffs can serve corporations by delivering a copy of the summons and the complaint to a managing officer or an agent.<sup>10</sup> In an action in which a foreign defendant or the defendant's agent is physically present in the United States, or, in the case of corporations, where the defendant's closely-affiliated entity, such as the parent or a subsidiary, is located within the United States, plaintiffs may also use these fairly straightforward domestic methods of service to serve foreign defendants.<sup>11</sup>

*B. Service of Process Abroad Under Rule 4(f)*

If a party cannot serve the foreign defendant within the United States, service must be carried out in a foreign country. Rule 4(f) of the Federal Rules of Civil Procedure governs service of process abroad, furnishing detailed instructions for service of individuals.<sup>12</sup> Rule 4(f) provides that service in a foreign country may be effected:

- (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or
- (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
  - (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

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<sup>8</sup> For example, Washington State allows service by mail only under the circumstances justifying service by publication, and only if the court determines that service by mail is as likely to give notice as service by publication. MARTINDALE-HUBBELL LAW DIGEST WA-18 (2000).

<sup>9</sup> FED. R. CIV. P. 4(d)(2). See also JACK. H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 177 (3d ed. 1999) (stating that Rule 4(d) highly encourages the use of first-class mail to save the cost of formal service).

<sup>10</sup> FED. R. CIV. P. 4(h).

<sup>11</sup> BORN, *supra* note 3, at 763-64.

<sup>12</sup> FED. R. CIV. P. 4(f)(1). Rule 4(h)(2), which governs service of corporations and unincorporated companies abroad, adopts the methods prescribed by Rule 4(f), with the exception of personal service covered by Rule 4(f)(2)(C)(i).

- (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
- (C) unless prohibited by law of the foreign country, by
  - (i) delivery to the individual personally of a copy of the summons and the complaint; or
  - (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
- (3) by other means not prohibited by international agreement as may be directed by the court.<sup>13</sup>

The most distinctive feature of Rule 4(f), which sets it apart from its predecessor Rule 4(i),<sup>14</sup> is the high emphasis it places on compliance with international and foreign law. Sub-parts (1) and (3) of the Rule prohibit service in violation of international agreements, and sub-part (2) disallows service in violation of foreign law.<sup>15</sup> Although sub-part (3) of the Rule, which allows the district court to unilaterally define an appropriate method of service,<sup>16</sup> on its face does not require compliance with foreign law, Advisory Committee notes to sub-part (3) indicate that, in directing a special method of service, a court must make an earnest effort to devise "a method that . . . minimizes offense to foreign law."<sup>17</sup> Further, in all circumstances, service of process abroad must comply with the U.S. constitutional requirement of reasonable notice.<sup>18</sup>

### C. *Practical Necessity of Complying With Foreign Law*

When directing service under Rule 4(f)(3), a court must try to minimize "offense to foreign law," although Rule 4(f)(3) does not necessarily preclude a court from ordering service in violation of foreign law.<sup>19</sup> However, several practical considerations may encourage service in compliance with foreign law. First, if the defendant has no assets in the

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<sup>13</sup> FED. R. CIV. P. 4(f).

<sup>14</sup> Rule 4(f) replaced Rule 4(i) in 1993. BORN, *supra* note 3, at 766.

<sup>15</sup> FED. R. CIV. P. 4(f).

<sup>16</sup> *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 460 (S.D. Fla. 1998).

<sup>17</sup> FED. R. CIV. P. 4(f) Advisory Committee's notes [hereinafter Advisory Committee's Notes], reprinted in BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 80 (2000 rev.).

<sup>18</sup> *Id.* at 80; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.").

<sup>19</sup> *Mayoral-Amy*, 180 F.R.D. at 459.

United States against which enforcement can be made, enforcement of a U.S. judgment abroad will likely be required.<sup>20</sup> Many countries will not recognize or enforce a judgment where service of process violated local law.<sup>21</sup> Thus, when the defendant does not have assets in the United States, it is important to ensure that service of process is carried out according to the foreign law.<sup>22</sup> Second, if service violates foreign law, the defendant will likely fail to answer the complaint or will move to dismiss for insufficient service, both of which can significantly delay adjudication.<sup>23</sup>

Compliance with foreign law, however, is often easier said than done. Difficulties arise because U.S. litigants are generally unaccustomed to the view held by civil law countries that service of process is a sovereign act that must be carried out by state officials according to state law.<sup>24</sup> In the absence of a treaty simplifying service of process between signatory countries, service of foreign process without governmental authorization is invalid in many countries, and in some cases is regarded as an infringement on national sovereignty.<sup>25</sup> Thus, a U.S. party's attempts to serve process through traditional U.S. methods, such as mail or personal delivery, are often deemed invalid in foreign courts.<sup>26</sup> Because of these difficulties, service of process abroad has been described as "one of the most challenging [problems] that a district court can be called upon to face."<sup>27</sup> Moreover, it is known as "a frequently lengthy, expensive and twisting process bordered on all sides with fatal pitfalls"<sup>28</sup> and a "tricky proposition."<sup>29</sup> Because no

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<sup>20</sup> Gary N. Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637, 638-39 (1980).

<sup>21</sup> BORN, *supra* note 3, at 942.

<sup>22</sup> Horlick, *supra* note 20, at 639; Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L. J. 515, 537 (1953).

<sup>23</sup> See, e.g., *Semtek Int'l Inc. v. Mercury Ltd.*, No. 95-11820-RCL, 1996 U.S. Dist. LEXIS 22248, at \*3 (D.Mass. Aug. 13, 1996); *Russian Federation Seeks Dismissal of Enforcement Action*, MEALEY'S INT'L ARB. REP., July 2000, available at LEXIS, News Group File, All.

<sup>24</sup> See Alphonse Kohl, *Romanist Legal Systems*, in XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 6, 108-09 (M. Cappelletti ed. 1984). This view of service of process stems from the inquisitorial nature of the civil trial in many civil law countries, whereby the judge, not counsel, conducts pre-trial discovery and questions opponents during trial. *Id.* at 68-69. See also Jones, *supra* note 22, at 531.

<sup>25</sup> BORN, *supra* note 3, at 775. Switzerland, which criminalizes unauthorized service of foreign process, is an example of "an extreme view on the nature of sovereignty, whereby any act touching Switzerland, including mailing of service into Switzerland from the United States, is viewed by Switzerland as a judicial act of the United States within Switzerland, thereby invading Swiss sovereignty." Horlick, *supra* note 20, at 641.

<sup>26</sup> See BORN, *supra* note 3, at 774.

<sup>27</sup> *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 458 (S.D. Fla. 1998).

<sup>28</sup> Horlick, *supra* note 20, at 637.

<sup>29</sup> *Chowanec v. Heyl Truck Lines*, No. 90 C 07034, 1991 U.S. Dist. LEXIS 8138, at \*2 (N.D. Ill. June 17, 1991).

comprehensive guide to each country's requirements for service of U.S. process exists,<sup>30</sup> counsel bringing suits against foreign residents must make an inquiry into each country's requirements for service of foreign process.

#### *D. Service of Process in Russia*

##### *1. Domestic Service of Process in Russia*

In Russian courts of general jurisdiction, a civil action commences when the plaintiff submits the complaint to the court of the first instance.<sup>31</sup> The Russian Code of Civil Procedure specifies that the complaint must be in writing and shall contain the names and addresses of the parties, the facts supporting the claim, the amount in controversy, and a list of documentary evidence supporting the claim.<sup>32</sup> The plaintiff or the plaintiff's representative must sign the complaint<sup>33</sup> and submit an additional copy of the complaint for each defendant.<sup>34</sup>

After accepting the complaint,<sup>35</sup> the court prepares the action for a hearing. In Russian courts, the judge, rather than the parties, conducts the necessary pretrial discovery, which is consistent with the inquisitorial nature of the judiciary in many civil law countries.<sup>36</sup> It is the duty of the judge to actively inquire into the circumstances of the case in order to fully and completely understand the matter.<sup>37</sup> To achieve this goal, the judge clarifies the contents of the complaint with the plaintiff, determines the scope of the discovery, determines whether co-plaintiffs must be introduced to the case,

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<sup>30</sup> See Horlick, *supra* note 20, at 637 n.3 (recommending that the U.S. State Department compile data on local procedures for service of process).

<sup>31</sup> M.S. SHAKARYAN, GRAZDANSKII PROTSESS 254 (1993).

<sup>32</sup> GRAZHDANSKII PROTSESSUAL'NYI KODEKS ROSSIJSKOI FEDERATSII [CIVIL PROCEDURE CODE OF THE RUSSIAN FEDERATION] art. 126, translated in Civil Procedure Code of the RSFSR, LEXIS, Garant-Service [hereinafter RUSSIAN CIVIL PROCEDURE CODE].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* art. 127.

<sup>35</sup> The judge has exclusive power to reject the complaint for any of the following reasons: (1) the issue has already been or is being litigated; (2) the plaintiff has not followed the peaceful settlement procedure required by certain kinds of courts; (3) the subject-matter of the case is outside the court's jurisdiction; (4) the plaintiff is incompetent; and (5) several other reasons. SHAKARYAN, *supra* note 31, at 258.

<sup>36</sup> The inquisitorial system is "[a] system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope of the inquiry. This system prevails in most of Continental Europe, in Japan, and in Central and South America." BLACK'S LAW DICTIONARY 796 (7th ed. 1999). In contrast to the common law adversary system, litigants in certain civil law countries are not allowed to conduct pretrial discovery and are severely limited in cross-examining witnesses during trial. Jones, *supra* note 22, at 531.

<sup>37</sup> L.V. LAZAREV ET AL., INOSTRANNIE GRAZDANE 283 (1992).

appoints the necessary experts, conducts on-sight examinations, and performs other similar actions.<sup>38</sup> If the case is "especially complicated,"<sup>39</sup> the judge may decide to summon the defendant for interrogation.<sup>40</sup> Although, at this point, the defendant necessarily becomes aware of the pending action, notice is not deemed to occur until the judge issues formal notification to the parties, summoning them to appear for a hearing.<sup>41</sup> The judge will issue the notification only after determining that the action is ready for a hearing.<sup>42</sup>

The formal notification must contain the name and address of the court, the place and time of appearance, the name of the case, the name of the summoned party, a suggestion to the parties to submit all the evidence they possess regarding the case, and a reference to the consequences of a default.<sup>43</sup> Simultaneously with the notification, the judge must issue to the defendant a copy of the complaint.<sup>44</sup> The notification, which also serves as a summons, must allow the parties "sufficient time" for appearance.<sup>45</sup> Because Russian law attaches great importance to the requirement that the parties receive adequate notice,<sup>46</sup> the preferred manner of service is personal delivery of the notification by a courier to the defendant's home or work.<sup>47</sup> If the defendant is not available, the notification may be handed to an adult member of his or her family, to the administration of the building where the defendant lives, or to the administration of the defendant's workplace.<sup>48</sup> The delivery of the notification may also be made by certified mail.<sup>49</sup> In all circumstances, the court must receive proof of service, consisting of a signed statement of the recipient on an official court form, before it permits the case to proceed.<sup>50</sup>

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<sup>38</sup> RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 142; SHAKARYAN, *supra* note 31, at 261.

<sup>39</sup> Russian sources do not explain what is meant by an "especially complicated" case. The judge, however, has wide discretion to decide this matter. SHAKARYAN, *supra* note 31, at 262.

<sup>40</sup> RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 142; SHAKARYAN, *supra* note 31, at 261.

<sup>41</sup> RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 106.

<sup>42</sup> SHAKARYAN, *supra* note 31, at 266.

<sup>43</sup> RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 107.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* art. 106. It is not clear just how much time is deemed sufficient. Given the wide discretion the judge enjoys in determining when the case is complicated enough to warrant interrogation of the defendant and in determining when the case is ready to proceed to the hearing, it is safe to suppose that the judge determines when the notification allows sufficient time to prepare for appearance.

<sup>46</sup> Edmund Wengerek, *Socialist Countries*, in XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 6, *supra* note 24, at 152; LAZAREV ET AL., *supra* note 37, at 286.

<sup>47</sup> RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 106.

<sup>48</sup> *Id.* art. 109.

<sup>49</sup> *Id.* art. 108.

<sup>50</sup> Wengerek, *supra* note 45, at 150; SHAKARYAN, *supra* note 30, at 267. If the defendant refuses to accept the notification, the courier or the post office official delivering the notification through certified



## 2. *Service of Foreign Process in Russia*

Under Russian law, service of process issuing out of a foreign country can be carried out in Russia only by means of a letter of request.<sup>51</sup> The theory behind this requirement is that since a court's power is confined to the country's territory, carrying out procedural acts within another country's territory necessarily requires permission of the foreign country.<sup>52</sup> Article 436 of the Russian Code of Civil Procedure provides that Russian courts shall execute letters of request asking for performance of judicial acts such as service of summons, except where performance of the request would violate Russia's sovereignty or security or fall outside of the competence of the court.<sup>53</sup> As one Russian commentator points out, the "sovereignty or security" caveat is a standard exception used by the Civil Codes of many countries.<sup>54</sup> In practice, Russian courts almost never refuse to execute foreign letters of request.<sup>55</sup> This is true even in the absence of a treaty, and, at least in theory, without requiring that the country issuing the letter of request assume a reciprocal obligation toward letters of request issuing out of Russian courts.<sup>56</sup>

The letter must go through a diplomatic channel, unless a treaty creates a different procedure.<sup>57</sup> This means that a letter of request issued by a U.S. court must first be delivered to the American Embassy in Moscow, which then dispatches it to the Russian Ministry of Foreign Affairs.<sup>58</sup> The Ministry of Foreign affairs sends the request to the Ministry of Justice,

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mail must make a notation thereof on the proof-of-service form, and return the form to the court. RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art 110.

<sup>51</sup> L.A. LUNTS & N.I. MARYSHEVA, MEZHDUNARODNYI GRAZHDANSKII PROTSESS 145 (1976). A "letter of request" is:

A document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction; and (2) return the testimony or proof of service for use in a pending case.

BLACK'S LAW DICTIONARY, *supra* note 36, at 916. Although "letter of request" is synonymous to "letter rogatory," the former is "preferred in modern usage." Advisory Committee's Notes, *supra* note 17, at 79.

<sup>52</sup> M.M. BOGUSLAVSKII, MEZHDUNARODNOE CHASTNOE PRAVO 240 (1974).

<sup>53</sup> RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 436.

<sup>54</sup> LAZAREV ET AL., *supra* note 37, at 286.

<sup>55</sup> GEORGE GINSBURGS, THE SOVIET UNION AND INTERNATIONAL COOPERATION IN LEGAL MATTERS 280, in 38 (II) LAW IN EASTERN EUROPE (F.J.M. Feldbrugge ed. 1992).

<sup>56</sup> LAZAREV ET AL., *supra* note 37, at 286; LUNTS & MARYSHEVA, *supra* note 51, at 145.

<sup>57</sup> LUNTS & MARYSHEVA, *supra* note 51, at 145.

<sup>58</sup> BOGUSLAVSKII, *supra* note 52, at 242.

which finally delivers it to the appropriate court.<sup>59</sup> The Russian court then serves process according to Russian procedural rules,<sup>60</sup> making a record of execution of the letter of request.<sup>61</sup> The confirmation of execution of the letter of request is returned to the United States through the same diplomatic route.<sup>62</sup> If a Russian court receives a letter of request directly from a U.S. court, it will send the letter to the Ministry of Justice without executing it.<sup>63</sup>

The requirement of service by means of a letter of request likely does not apply when the person to be served is a citizen of the United States. When acceding to the Hague Convention Relating to Civil Procedure,<sup>64</sup> Russia indicated that it did not object to the provision allowing consuls to directly serve the nationals of the represented countries, as long as no compulsion was used.<sup>65</sup> Although, strictly speaking, this exception applies only to the countries that signed the Convention Relating to Civil Procedure, it is safe to presume that Russia would extend the same rules to the United States. First, the tone of Russia's declaration suggests that it assumed a universal application of the exception.<sup>66</sup> Second, other countries that forbid direct service of process within their territory make an exception for service upon a national of the country issuing the process,<sup>67</sup> and Russia would likely follow this trend.

## *E. International Agreements Governing Service of Process*

### *1. Hague Service Convention*

The Federal Rule of Civil Procedure 4(f)(1) provides that service in a foreign country may be effected "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters" ("Hague Service

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<sup>59</sup> *Id.* at 243. The appropriate court is the court that has venue and personal jurisdiction over the defendant. LUNTS & MARYSHEVA, *supra* note 51, at 146.

<sup>60</sup> See *infra* Part III.

<sup>61</sup> LUNTS & MARYSHEVA, *supra* note 51, at 146.

<sup>62</sup> *Id.* at 147.

<sup>63</sup> BOGUSLAVSKII, *supra* note 52, at 243.

<sup>64</sup> Convention Relating to Civil Procedure, Mar. 1, 1954, 286 U.N.T.S. 265, reprinted in RISTAU, *supra* note 17, at A-443. This convention is not in force in the United States. *Id.*

<sup>65</sup> SBORNIK MEZHDUNARODNIH DOGOVOROV O VZAIMNOI PRAVOVOI POMOSHI PO GRAZHDANSKIM I UGOLOVNIM DELAM 572-73 (Kravtsov ed. 1988) [hereinafter SBORNIK DOGOVOROV].

<sup>66</sup> After reiterating the usual requirement for diplomatic-channel service of letters of request, Russia stated that this rule "of course" does not apply for service upon the country's own nationals. *Id.* at 572.

<sup>67</sup> BORN, *supra* note 3, at 779 n.5.

Convention").<sup>68</sup> The Hague Service Convention simplifies and speeds up the often complicated requirements of serving U.S. process abroad by setting up uniform procedures between the signatory countries.<sup>69</sup> For example, the Central Authority, a designated governmental body in each contracting country, is responsible for receiving and dispatching process and returning proof of service to the requesting state.<sup>70</sup>

Unfortunately for U.S. litigants, Russia does not adhere to the Hague Service Convention.<sup>71</sup> Russian sources do not explain why Russia chose not to join the Convention.<sup>72</sup> One possible explanation lies in the 1947 Resolution of the Presidium of the Supreme Soviet of the U.S.S.R. ("1947 Resolution"),<sup>73</sup> which ordered that communication between Russian and foreign governmental entities was to occur exclusively through diplomatic channels.<sup>74</sup> Thus, a lasting product of Stalin's "iron curtain" policy<sup>75</sup> is the requirement that service of foreign process has to be made only by transmission of letters of request through diplomatic channels.<sup>76</sup> The more direct mechanism of the Hague Service Convention was probably unacceptable because it did not comport with the strict requirements of the 1947 Resolution.

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<sup>68</sup> FED. R. CIV. P. 4(f)(1); Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

<sup>69</sup> See generally Hague Service Convention, *supra* note 68.

<sup>70</sup> *Id.* art. 14.

<sup>71</sup> See Table of Ratifications ("R") and Accessions ("A") to the Hague Conventions on Judicial Assistance to which the United States is a Party, in RISTAU, *supra* note 17, at A-5, A-6 [hereinafter *Ratifications and Accessions*] (showing that Russia did not ratify or accede to the Hague Service Convention).

<sup>72</sup> See, e.g., LUNTS & MARYSHEVA, *supra* note 51, at 164-65 (providing an overview of the Hague Service Convention, but not explaining why Russia did not join it).

<sup>73</sup> The Presidium of the Supreme Soviet of the U.S.S.R. was a permanent commission organized inside the Supreme Soviet (Supreme Council) of the U.S.S.R., vested with broad executive powers. Resolutions of the Presidium were unilaterally-issued binding executive orders. JURIDICHESKII SPRAVOCHNIK DLYA NASELENIIA 10 (E.A. Motina & V.I. Panteleev eds., 1989).

<sup>74</sup> LUNTS & MARYSHEVA, *supra* note 51, at 145.

<sup>75</sup> "Iron curtain" is "a barrier to understanding and the exchange of information created by the hostility of one country toward another, especially such a barrier between the Soviet Union and its allies and other countries." WEBSTER'S COLLEGE DICTIONARY 712 (1991). The term was first "used by Winston Churchill in 1946 to describe the line of demarcation between the Western Europe and the Soviet zone of influence." *Id.*

<sup>76</sup> See LUNTS & MARYSHEVA, *supra* note 51, at 145.

## 2. *The Moscow Agreement*

Although Rule 4(f)(1) expressly favors the use of the Hague Service Convention,<sup>77</sup> it also contemplates the use of service mechanisms prescribed by other agreements.<sup>78</sup> The Advisory Committee notes to Rule 4(f) point out that the Rule was devised to call attention to the "other treaties bearing on service of documents in foreign countries," including treaties which may not be fully known.<sup>79</sup> Russia has entered into a number of special judicial assistance treaties that significantly simplify service of foreign process within Russia by eliminating the requirement of a diplomatic-channel transmittal of letters of request.<sup>80</sup> Letters of request coming from any of the signatory countries can go directly to the Department of Justice of the Russian Federation.<sup>81</sup> Not surprisingly, since most of the signatories of these treaties are former socialist countries,<sup>82</sup> the United States is not a party to such a treaty.<sup>83</sup>

The only candidate for an "internationally agreed means" for service of process in Russia under Rule 4(f)(1) is the 1935 Exchange of Diplomatic Notes Concerning Execution of Letters of Request Between the United States and Russia ("Moscow Agreement").<sup>84</sup> The Moscow Agreement lays

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<sup>77</sup> Hugh Bangasser & Toussaint Myricks, *Procedural Aspects of International Civil Litigation: Selected Issues Relating to Service of Process, Foreign Discovery for U.S. Litigation and Enforcement of Judgments* 5 (July 6, 1994) (unpublished manuscript, on file with the Gallagher Law Library of the University of Washington School of Law).

<sup>78</sup> The plain language of Rule 4(f)(1) allows service "by any internationally agreed means reasonably calculated to give notice." FED. R. CIV. P. 4(f)(1).

<sup>79</sup> Advisory Committee's Notes, *supra* note 17, at 75.

<sup>80</sup> Examples include agreements with Poland and Hungary. See BOGUSLAVSKII, *supra* note 52, at 243.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See SBORNIK DOGOVOROV, *supra* note 65. This compilation of all international judicial assistance agreements signed by Russia from 1958 to 1987 does not list any agreements with the United States. See also HANS SMIT & ARTHUR MILLER, *INTERNATIONAL COOPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICES AND PROCEDURES PREVAILING IN THE UNITED STATES* 79-85 (1961) (listing all U.S. Agreements on international judicial assistance); *Ratifications and Accessions*, *supra* note 71, at A-5-7 (listing all Hague Conventions to which the United States is a party). Besides the Moscow Agreement, *infra* note 84, and the Convention Abolishing the Requirement of Legalization of Foreign Public Documents, entered into force Oct. 15, 1961, 33 U.S.T. 883; T.I.A.S. 10072, these sources do not mention any judicial assistance agreements between Russia and the United States.

<sup>84</sup> Exchange of Notes between the United States and the Union of Soviet Socialist Republics Concerning Execution of Letters Rogatory, Nov. 22, 1935, 49 Stat. 3840, CLXVII L.N.T.S. 303 [hereinafter Moscow Agreement]. The Moscow Agreement, signed by the no-longer-existing U.S.S.R., today binds the Russian Federation. On January 13, 1992, shortly after the break-up of the U.S.S.R., the Russian Federation issued a Note to the Heads of Diplomatic Representations in Moscow, which stated that Russia will "continue to perform the rights and fulfill the obligations following from the international agreements signed by the Union of the Soviet Socialist Republics" and requested that the Russian

down the conditions for execution of the other country's letters of request.<sup>85</sup> The Russian part of the Moscow Agreement merely reiterates the usual procedure for transmittal of foreign letters of request under Russian law.<sup>86</sup> It provides that delivery of letters of request issued by the United States courts must occur through the diplomatic channel, i.e., through the American embassy in Moscow and then through the People's Commissariat of Foreign Affairs, the predecessor of the Ministry of Foreign Affairs.<sup>87</sup> When executed, the letters of request should be returned through the same channel.<sup>88</sup> The Moscow Agreement also specifies that Russian translations of all the basic documents should accompany the letters of request, that execution of each letter requires a fee of \$5 to \$10, and that the letters must be addressed to the Supreme Court of a particular Republic of the Soviet Union or "to the competent court of the U.S.S.R."<sup>89</sup> Under the Moscow Agreement, Russian courts give effect to the letters according to domestic procedural rules.<sup>90</sup> The Moscow Agreement also sets out the United States' requirements for execution of Russian letters of request by the U.S. courts.<sup>91</sup>

### III. THE MOSCOW AGREEMENT DOES NOT QUALIFY AS AN "INTERNATIONALLY AGREED MEANS" OF SERVICE OF PROCESS UNDER RULE 4(F)(1)

The Moscow Agreement is not an "internationally agreed means" within the meaning of Rule 4(f)(1).<sup>92</sup> Although the Agreement has earned some recognition as a treaty governing service of process between Russia and the United States,<sup>93</sup> the Agreement's primary purpose is to inform the parties about the particularities of obtaining evidence through letters of request, not to set up procedures for service of process. Moreover, courts

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Federation be considered a party to all international agreements in force instead of the U.S.S.R. *Declarations by Member States*, in RISTAU, *supra* note 17, at A-171, A-220.

<sup>85</sup> Moscow Agreement, *supra* note 84.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* In essence, without setting forth the precise requirements, the United States informs Russia that letters of request would be carried out in accordance with the pertinent rules of the United States, or its States or Territories. Russia is assured that it should not encounter any problems if it complies with the pertinent laws, but is forewarned that no part of the Executive Branch can be used as a channel for the transmittal of letters of request. *Id.*

<sup>92</sup> FED. R. CIV. P. 4(f)(1).

<sup>93</sup> See, e.g., GINSBURGS, *supra* note 55, at 33; Bruno Ristau, *Overview of International Judicial Assistance*, 18 INT'L LAW. 525, 526 (1984).

have declared the Moscow Agreement inapplicable under the service of process provision of the Foreign Sovereign Immunities Act, which closely parallels the language of Rule 4(f)(1).<sup>94</sup> Because the Moscow Agreement is the only candidate for an "internationally agreed means" between the United States and Russia, Rule 4(f)(1) cannot be used to serve process in Russia. Even if a court finds that the Moscow Agreement is applicable under Rule 4(f)(1), however, the Moscow Agreement is non-exclusive and does not preclude the use of additional methods of service under Rule 4(f)(2).

*A. Factors Tending to Show that the Moscow Agreement Qualifies as an "Internationally Agreed Means" under Rule 4(f)(1)*

Several considerations may mistakenly lead one into thinking that the Moscow Agreement is an "internationally agreed means" under Rule 4(f)(1). The Moscow Agreement is an executive agreement, falling within the plain meaning of the term "internationally agreed means."<sup>95</sup> Two prominent American commentators have mentioned the Moscow Agreement as a binding treaty still in force.<sup>96</sup> At least one U.S. court has recently referred to it as "mutually-agreed upon means of service of process between Russia and the United States."<sup>97</sup> For instance, in *Semtek Int'l, Inc. v. Mercury Ltd.*,<sup>98</sup> an American company attempted to serve a Siberian company by mail.<sup>99</sup> The court held that service should have been made by letter of request, pursuant to the Moscow Agreement.<sup>100</sup> The Moscow Agreement has also earned recognition by some Russian scholars, who list it as a bilateral U.S.S.R.—U.S. agreement on reciprocal judicial assistance.<sup>101</sup> Several Russian sources contain references to the letters of request flowing both to and from Russia pursuant to the Agreement.<sup>102</sup>

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<sup>94</sup> Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611 (1994).

<sup>95</sup> An executive agreement is "an international agreement entered into by the President, without the need for approval by the Senate, and usually involving routine diplomatic matters." BLACK'S LAW DICTIONARY, *supra* note 36, at 591. This type of international agreement should be contrasted with a treaty, which is "a formally signed and ratified agreement between two nations and sovereigns." *Id.* at 1507.

<sup>96</sup> GINSBURGS, *supra* note 55, at 33; Ristau, *supra* note 93, at 526.

<sup>97</sup> *Semtek Int'l, Inc. v. Mercury Ltd.*, No. 95-11820-RCL, 1996 U.S. Dist. LEXIS 22248, at \*5 (D.Mass. 1996).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at \*2, \*4.

<sup>100</sup> *Id.* at \*8.

<sup>101</sup> BOGUSLAVSKII, *supra* note 52, at 242; LUNTS & MARYSHEVA, *supra* note 51, at 159.

<sup>102</sup> See GINSBURGS, *supra* note 55, at 33-35.

*B. The Moscow Agreement Is Not an "Internationally Agreed Means" under Rule 4(f)(1)*

Despite the above considerations, however, the Moscow Agreement is not an "internationally agreed means" for the purposes of Rule 4(f)(1). Unlike the Hague Service Convention, the Moscow Agreement was not devised to provide mutually agreed-upon methods of service.<sup>103</sup> Rather, it merely secures transmittal of letters of request between the United States and Russia and informs both sides about the conditions and manner of their execution.<sup>104</sup> In contrast to the Hague Service Convention and the Inter-American Convention on Letters Rogatory (another treaty commonly accepted as applicable under Rule 4(f)(1)),<sup>105</sup> the Moscow Agreement does not mention service of process.<sup>106</sup> The Agreement does, however, contain multiple references to obtaining witness testimony,<sup>107</sup> which suggests that the parties considered taking evidence abroad the primary focus of the Agreement. In addition, unlike the Hague Service Convention,<sup>108</sup> the Moscow Agreement does not furnish any additional methods of service, as it merely reiterates the usual requirement of diplomatic transmittal of requests for service of process.<sup>109</sup> Moreover, despite its recognition by several scholars and courts, neither U.S. nor Russian compilations of treaties list the Moscow Agreement as a treaty governing service of process.<sup>110</sup>

The cases that considered the Moscow Agreement and similar treaties in the context of the Foreign Sovereign Immunities Act ("FSIA") further illustrate its inapplicability to Rule 4(f)(1).<sup>111</sup> The FSIA's provisions for service of foreign sovereigns are almost identical to those of Rule 4(f)(1): section of 1608(a)(2) of the FSIA allows delivery of summons and complaint "in accordance with any applicable international convention on

<sup>103</sup> Hague Service Convention, *supra* note 68.

<sup>104</sup> Moscow Agreement, *supra* note 84.

<sup>105</sup> BORN, *supra* note 3, at 767.

<sup>106</sup> Moscow Agreement, *supra* note 84.

<sup>107</sup> See *id.* For example, the U.S. Ambassador refers to state laws governing presentation of letters of request for the purpose of taking witness testimony. The Russian counterpart mentions translation of interrogatories and reimbursement of expenses incurred by witnesses. In light of these allusions, absence of any reference to service of process strongly suggests that the parties to the Moscow Agreement did not view it as an agreement governing service of process abroad. *Id.*

<sup>108</sup> Hague Service Convention, *supra* note 68. The Central Authority mechanism is an example of a new procedure designed to facilitate service.

<sup>109</sup> See *infra* Part II.E.2.

<sup>110</sup> See, e.g., SMIT & MILLER, *supra* note 83, at 81 (listing the Moscow Agreement as an agreement relating to the execution of letters rogatory).

<sup>111</sup> Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611.

service of judicial documents.”<sup>112</sup> In *Filus v. Lot Polish Airlines*, the district court held that the Moscow Agreement covers only the procedures to honor the other party’s letters of request and does not constitute “an applicable international convention.”<sup>113</sup> In *Richmark v. Timber Falling Consultants*,<sup>114</sup> the Ninth Circuit found that the Consular Convention between the United States and China,<sup>115</sup> which briefly touched upon service of process through consular officers, was inapplicable under the FSIA because service of process was not the Convention’s primary purpose.<sup>116</sup> Similarly, because the Moscow Agreement’s purpose is not service of process, it does not qualify as an international convention on service of judicial documents under the FSIA.<sup>117</sup> Given the similarities in the language of the FSIA and Rule 4(f)(1), the inapplicability of the Moscow Agreement under the FSIA indicates that it is likely inapplicable under Rule 4(f)(1). The legislative history of the FSIA supports this interpretation. The House Report states that the only applicable international convention on service of process to which the United States is at present a party is the Hague Service Convention.<sup>118</sup> Had Congress perceived the Moscow Agreement as “an applicable international convention,” it would not have made this statement.

In sum, because the Moscow Agreement was devised merely to describe and secure transmission of letters of request, not to provide new methods of service of process, and also because it is inapplicable under the FSIA, the Moscow Agreement most likely does not qualify as an

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<sup>112</sup> *Id.* 28 U.S.C. § 1608(a) provides that:

service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

...

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents . . . .

Compare this language to the language of Rule 4(f)(1), allowing service “by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the [Hague Service Convention].” FED. R. CIV. P. 4(f)(1).

<sup>113</sup> *Filus v. Lot Polish Airlines*, 819 F. Supp. 232, 237 (E.D.N.Y. 1993).

<sup>114</sup> *Richmark Corp. v. Timber Falling Consultants*, 937 F.2d 1444 (9th Cir. 1991).

<sup>115</sup> The Consular Convention between the United States and the People’s Republic of China, Feb. 19, 1982, 33 U.S.T. 2973. The Convention lays down procedures for appointment, operation and termination of U.S. and Chinese consulates. Article 29 of the Convention provides that “[a] consular officer shall be entitled to serve judicial and other legal documents in accordance with international agreements in force between the sending and receiving state, or, in the absence of such agreements, to the extent permitted by the law of the receiving state.” *Id.* at 2998.

<sup>116</sup> *Richmark*, 937 F.2d at 1448.

<sup>117</sup> Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611.

<sup>118</sup> H. R. 1487, 94th Cong. (1976).



"internationally agreed means" for the purposes of Rule 4(f)(1). Thus, Rule 4(f)(1) is not pertinent to service of process in Russia.

C. *The Moscow Agreement is Non-Exclusive*

Under Rule 4(f)(2), the use of an international agreement is mandatory only when it expressly prescribes the exclusive use of a particular service mechanism.<sup>119</sup> For example, because the Hague Service Convention contains mandatory language such as "*shall* apply in *all* cases" (emphasis added), the U.S. Supreme Court has held that its use is mandatory in all cases to which it applies.<sup>120</sup> The Moscow Agreement contains no such mandatory language. Its tone is more informational than mandatory. For example, in the preamble each party states that it has the honor to inform the other party about the procedure for transmittal and execution of letters of request in its respective country.<sup>121</sup> Therefore, even if the court decides that the Moscow Agreement is an "internationally agreed means" under Rule 4(f)(1), the Agreement does not preclude the use of other methods of service set forth in Rule 4(f)(2).

D. *Significance of The Moscow Agreement in Light of Its Inapplicability under Rule 4(f).*

Although Rule 4(f) does not require the use of the Moscow Agreement,<sup>122</sup> U.S. litigants can use the Agreement as a rough guide for serving process in Russia if compliance with Russian procedural rules is desirable. This may occur, for example, when the defendant has no assets in the United States and subsequent enforcement of the judgment in Russia is necessary.<sup>123</sup> From the standpoint of Russian courts and litigants, the procedure outlined in the Moscow Agreement remains the only valid method of service of U.S. process in Russia.<sup>124</sup> Russian defendants consistently

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<sup>119</sup> Rule 4(f)(2) provides that other methods of service may be employed "if there is no internationally agreed means of service or the applicable international agreement allows other means of service . . ." According to Advisory Committee's Notes to Rule 4(f), "the methods of service appropriate under an applicable treaty shall be employed if available and if the treaty so requires." Advisory Committee's Notes, *supra* note 17, at 79.

<sup>120</sup> BORN, *supra* note 3, at 767.

<sup>121</sup> See Moscow Agreement, *supra* note 84.

<sup>122</sup> See *supra* Part II.

<sup>123</sup> *Id.*

<sup>124</sup> SHAKARYAN, *supra* note 31, at 160.

argue that U.S. plaintiffs must follow the Moscow Agreement,<sup>125</sup> thus it is highly likely that U.S. parties will encounter references to the Agreement when interacting with their Russian counterparts.

#### IV. ALTERNATIVE METHODS OF SERVICE UNDER RULE 4(F)(2): ALL ROADS LEAD TO LETTERS OF REQUEST

Rule 4(f)(2) lists several options for service of process abroad, including: (A) service "in a manner prescribed by the law of the foreign country for service in that country," (B) "as directed by the foreign authority in response to a . . . letter of request," and (C) by personal delivery or mail, "unless prohibited by the law of the foreign country."<sup>126</sup> Out of these options, only service under Rule 4(f)(2)(B), "as directed by the foreign authority in response to a letter rogatory or letter of request," provides a viable method of service of process in Russia. Service under Rule 4(f)(2)(A), "in a manner prescribed by the law of the foreign country in . . . its courts of general jurisdiction," is not an alternative for U.S. litigants because in the Russian legal system service cannot be carried out by private individuals, but must be issued and delivered by the court. Further, because under Russian law, U.S. process can be served only by letters of request, service by mail or personal delivery under Rule 4(f)(2)(C) violates Russian law, running against the requirement that service does not violate foreign law. Thus, among the methods listed in Rule 4(f)(2), service by means of letters of request under part (B) is the only available method of service of process in Russia.

##### A. *Rule 4(f)(2)(A): Service in The Manner Prescribed by Russian Domestic Law Is Not Possible*

Under Rule 4(f)(2)(A), service can be made "in the manner prescribed by the law of the foreign country for service in that country in . . . its courts of general jurisdiction," is subject to the requirement of the Rule 4(f)(2) preamble that such service be reasonably calculated to give notice.<sup>127</sup> If the service is accomplished as required by the Russian law, i.e. by certified mail or in person, with the mandatory proof of service,<sup>128</sup> such manner of service

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<sup>125</sup> See, e.g., *Filus v. Lot Polish Airlines*, 819 F. Supp. 232, 237 (E.D.N.Y. 1993); *Russian Federation Seeks Dismissal of Enforcement Action*, *supra* note 23.

<sup>126</sup> FED. R. CIV. P. 4(f)(2).

<sup>127</sup> FED. R. CIV. P. 4(f)(2)(A).

<sup>128</sup> See RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, arts. 107-08.

meets the U.S. Due Process requirement that notice be of such nature as reasonably to convey the required information and give the defendant reasonable time to respond.<sup>129</sup> Thus, the methods employed by Russian courts of general jurisdiction appear acceptable under Rule 4(f)(2)(A).

However, the peculiarities of Russian law make Rule 4(f)(2)(A) impossible to apply. In Russian internal judicial proceedings, service is always issued by the court and is either put in the mail by the judge or is carried out by a court-appointed official,<sup>130</sup> because Russia, like other civil law countries, considers service of process an official act of the state.<sup>131</sup> Although no provision in the Russian Civil or Criminal Code expressly prohibits service by private parties, private service, whether by mail or in person, is not contemplated by the law.<sup>132</sup> Thus, service by registered mail or in person in accordance with Russian law can be achieved only if the U.S. litigant submits the complaint to the Russian court and waits for it to issue and deliver service of process.<sup>133</sup> This will commence litigation within the Russian judicial system, but will not affect the U.S. process. Private service of the U.S. process, on the other hand, is not authorized by Russian law. Because under Rule 4(f)(2)(A), service abroad must be carried out "in the manner prescribed by the law of the foreign country,"<sup>134</sup> U.S. parties cannot use Rule 4(f)(2)(A) to serve process in Russia.

*B. Rule 4(f)(2)(C): Service by Mail or Personal Delivery Should Not Be Authorized*

Rule 4(f)(2)(C) allows service by (i) personal delivery<sup>135</sup> or (ii) mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court.<sup>136</sup> These means of service can be used only if they are "not prohibited by the law of the foreign country."<sup>137</sup> The possibility of two different interpretations of the word "prohibited" has created a split in the district

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<sup>129</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>130</sup> *Wengerek*, *supra* note 46, at 150-51. *See also* RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 108.

<sup>131</sup> *Kohl*, *supra* note 24, at 108; *see also supra* Part II.

<sup>132</sup> *Wengerek*, *supra* note 46, at 150.

<sup>133</sup> Russian law freely allows foreigners to use the Russian judicial system. However, foreigners can be refused forum for reasons such as lack of subject-matter jurisdiction or *res judicata*, which are also reasons to refuse forum to Russian citizens. *LAZAREV*, *supra* note 37, at 264-65; RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 433.

<sup>134</sup> FED. R. CIV. P. 4(f)(2)(A).

<sup>135</sup> Note that service of foreign corporations by personal delivery is prohibited by Rule 4(h)(2). *See* FED. R. CIV. P. 4(h)(2).

<sup>136</sup> FED. R. CIV. P. 4(f)(2)(C).

<sup>137</sup> *Id.*

courts. Under the first interpretation, "prohibited" means "specifically forbidden by the law." In *Dee-K Enter. v. Heveafil Sdn. Bhd.*, the court adopted this view and permitted service of Indonesian and Malaysian defendants via DHL courier, although the laws of these countries did not authorize service by mail.<sup>138</sup> The court stated that the interpretation of "prohibited" as simply "not prescribed" is inconsistent with the ordinary usage of the word<sup>139</sup> and renders Rule 4(f)(2)(C) superfluous to 4(f)(2)(A), which allows service as prescribed by the foreign law. Under this interpretation, service by mail or personal delivery in Russia would be allowed because Russian law does not explicitly prohibit such methods of service.

The second interpretation of the word "prohibited" is "not authorized." In *Graval v. P.T. Bakrie & Bros.*, the court quashed service by mail in Indonesia, although Indonesian law did not explicitly prohibit service by mail.<sup>140</sup> The court held that service of process had to be carried out as prescribed by Indonesian law, which authorized service by means of letters of request through the diplomatic channel.<sup>141</sup> The court noted that such interpretation of Rule 4(f)(2)(C) better comports with the spirit of the 1993 amendments to Rule 4(f), which emphasize the importance of foreign law.<sup>142</sup> Because the Russian Code of Civil Procedure and the 1947 Resolution of the Presidium of the Supreme Soviet allow service of foreign process only by letter of request,<sup>143</sup> this interpretation of Rule 4(f)(2)(C) disallows service in Russia by mail or personal delivery.<sup>144</sup>

These interpretations of Rule 4(f)(2)(C) leave unanswered the question of what part of the foreign law must be examined and whether accepted practices unaccounted for by the written law must be taken into account. It is preferable to view all the particularities of the foreign law in the aggregate instead of blindly following one of the interpretations of the word "prohibit." In fact, such a flexible approach is unavoidable. The *Dee-K* court, which allowed service by mail in Indonesia and Malaysia, did not do so solely because no law forbade service by mail.<sup>145</sup> Additional considerations influenced the court's decision. For example, there was

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<sup>138</sup> *Dee-K Enter. v. Heveafil Sdn. Bhd.*, 174 F.R.D. 376, 381-82. (E.D. Va. 1997).

<sup>139</sup> The dictionary definition of "prohibit" is to forbid by authority or command or enjoin. *Id.* at 379.

<sup>140</sup> *Graval v. P.T. Bakrie & Bros.*, 986 F. Supp. 1326, 1329 (C.D. Cal. 1996).

<sup>141</sup> *Id.* at 1330.

<sup>142</sup> Advisory Committee's Notes, *supra* note 17, at 79-80.

<sup>143</sup> RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32, art. 436; LUNTS & MARYSHEVA, *supra* note 51, at 145.

<sup>144</sup> See *Graval*, 986 F. Supp. at 1330.

<sup>145</sup> *Dee-K Enter. v. Heveafil Sdn. Bhd.*, 174 F.R.D. 376, 381-82 (E.D. Va. 1997).

evidence that in Indonesia foreign process served by registered mail was routinely accepted as a matter of practice.<sup>146</sup> The court also took notice of a Department of State publication, which specifically stated that service in Malaysia could be done by registered mail.<sup>147</sup>

Even under this flexible approach, service in Russia by mail or personal delivery under Rule 4(f)(2)(C) should not be allowed. Although Russian law does not expressly forbid private service of foreign process,<sup>148</sup> it is axiomatic that private service of process is not contemplated by the law.<sup>149</sup> There is no evidence that Russia has ever recognized private service of foreign process by means other than through letters of request. Further, the General Counsel of the Administrative Office of the U. S. Courts pointed out in its memorandum to U. S. District Court Clerks that, as a consequence of numerous diplomatic protests to service by international mail, service of process in Russia is appropriate only through letters of request.<sup>150</sup> Moreover, express prohibition is not the only method to "prohibit" a practice. Because the 1947 Resolution of the Presidium of the Supreme Soviet provides that all interactions between Russian and foreign officials must be conducted through diplomatic channels only,<sup>151</sup> by negative implication it prohibits private service of foreign process. Thus, taking into account all aspects of Russian law and practice, even a liberal interpretation of Rule 4(f)(2)(C) does not authorize service of U.S. process by mail or personal delivery.

*C. Rule 4(f)(2)(B): Service by Letter of Request Is the Only Available Method*

Under Rule 4(f)(2)(B), service of process can be carried out "as directed by the foreign authority in response to a letter rogatory or letter of request."<sup>152</sup> Service by means of letters of request, incorporated by the

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<sup>146</sup> *Id.* at 381.

<sup>147</sup> *Id.* at 382.

<sup>148</sup> Neither the Civil nor the Criminal Code of Russia contain any provisions expressly prohibiting private service of process, whether originating domestically or abroad. See RUSSIAN CIVIL PROCEDURE CODE, *supra* note 32; UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [CRIMINAL CODE OF THE RUSSIAN FEDERATION], translated in Criminal Code of the Russian Federation, available at LEXIS, Garant-Service. Compare this to the criminal penalties imposed by Swiss law on serving foreign process in Switzerland. See BORN, *supra* note 3, at 776.

<sup>149</sup> Wengerek, *supra* note 46, at 150.

<sup>150</sup> Instructions of Administrative Office of U.S. Courts Concerning Mail Service Abroad, in RISTAU, *supra* note 17, at 92.

<sup>151</sup> LUNTS & MARYSHEVA, *supra* note 51, at 145.

<sup>152</sup> FED. R. CIV. P. 4(f)(2)(B).

Moscow Agreement,<sup>153</sup> is the only mechanism for service of U.S. process authorized by Russian law.<sup>154</sup> Thus, it is the only method listed in Rule 4(f)(2) that comports with the requirement of service not being prohibited by the foreign law. Because Russian procedural rules, which Russian courts employ to carry out letters of request,<sup>155</sup> ensure proper notice to the parties,<sup>156</sup> service by means of letters of request fulfills the Rule 4(f)(2) requirement of reasonable notice.<sup>157</sup>

Service by letters of request, even when the request is sent directly to the appropriate court, may be extremely time-consuming.<sup>158</sup> Russia's requirement that letters of request navigate the diplomatic channel before reaching the court and follow the same route back to the United States<sup>159</sup> further complicates and lengthens the process. In addition, mere issuance of a letter of request is not enough to satisfy Rule 4(f)(2)(B). Rather, the foreign authority must actually serve the defendant in response to the letter of request and submit a proof of service to the court.<sup>160</sup> In *Proctor and Gamble Cellulose Co. v. Viskoza-Loznica*, the court, upon plaintiff's application, issued letters of request to Yugoslav defendants.<sup>161</sup> Because the plaintiff was not able to show that Yugoslav authorities actually served one of the defendants, the court subsequently held that service on that defendant did not meet the requirements of Rule 4(f)(2)(B).<sup>162</sup> Moreover, because the monetary penalty imposed by Rule 4(d) for failure to waive service<sup>163</sup> does not encompass foreign defendants,<sup>164</sup> no incentive prompts the foreign defendant to answer the complaint timely or waive formal service.

Despite all these difficulties, it appears that letters of request issuing out of U.S. courts often reach Russian courts and get carried out

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<sup>153</sup> Moscow Agreement, *supra* note 84; *see also supra* Part II.

<sup>154</sup> LUNTS & MARYSHEVA, *supra* note 51, at 145.

<sup>155</sup> *See supra* Part II.D.2 (specifying that Russian procedural rules govern the execution of letters of request once the letter reaches the appropriate court).

<sup>156</sup> *See supra* Part II.D.1 (describing Russian requirement of reasonable notice); *see also supra* Part VI.A (explaining that Russian rules comport with U.S. Due Process requirements).

<sup>157</sup> FED. R. CIV. P. 4(f)(2).

<sup>158</sup> *See Advantages and Disadvantages of the Five Alternative Methods for Service Abroad Provided in Rule 4(f)*, in RISTAU, *supra* note 17, at 95 (listing the length of the procedure as one of the disadvantages of service by letters of request). *See also* Jones, *supra* note 22, at 530 n.42 (in one case a letter of request to a court in Paris took two years to complete).

<sup>159</sup> *See supra* Part II.D.2.

<sup>160</sup> *Proctor and Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 665-66 (W.D. Tenn. 1998).

<sup>161</sup> *Id.* at 665.

<sup>162</sup> *Id.* at 666.

<sup>163</sup> FED. R. CIV. P. 4(d)(5) imposes on the defendant the costs for failure to waive formal service of process, including a reasonable attorney's fee.

<sup>164</sup> FED. R. CIV. P. 4(d)(2) requires that the defendant be located within the United States. *Id.*

successfully. For example, according to one Russian commentator, in 1988 a Texas state court asked a Russian court to obtain a witness deposition and copies of certain medical records in connection with a wrongful death suit against Dresser Industries.<sup>165</sup> The Russian court successfully fulfilled the request.<sup>166</sup> There are a number of other examples of diligent execution of foreign letters of request by Russian courts.<sup>167</sup> Although all of these cases have to do with requests for collection of evidence, this is a good indicator that service through letters of request can prove successful.

#### V. RULE 4(f)(3): SERVICE BY OTHER MEANS

Rule 4(f)(3) provides U.S. litigants with the only alternative to pursuing service through letters of request: it allows service by "other means not prohibited by international agreement as may be directed by the court."<sup>168</sup> Rule 4(f)(3) gives the court discretion to use methods of service not covered by the other provisions of Rule 4(f), as long no international agreements prohibit such methods of service.<sup>169</sup>

Similar to the "prohibited by the law of the foreign country" language in Rule 4(f)(2)(C), the language "not prohibited by international agreement" of Rule 4(f)(3) raises questions of interpretation. It is not clear from the plain language of the Rule whether "prohibited by international agreement" means "expressly forbidden" or simply "invalid." No cases have yet addressed this question. However, the Advisory Committee notes suggest that the court must only devise a method of service that would not be expressly forbidden by a specific provision of the agreement.<sup>170</sup> Thus, because the Moscow Agreement does not specifically prohibit methods of service other than by letters of request, the court may direct service of process in Russia by alternative methods.

Rule 4(f)(3) does not forbid courts from directing service in violation of foreign law; however, a party may not serve process in violation of foreign law without the court's authorization.<sup>171</sup> No court has yet directed service in Russia under Rule 4(f)(3). Cases dealing with service in other countries indicate that Rule 4(f)(3) should be used only as a last resort, when

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<sup>165</sup> LAZAREV, *supra* note 37, at 287-88.

<sup>166</sup> *Id.*

<sup>167</sup> See GINSBURGS, *supra* note 55, at 33-36; LAZAREV, *supra* note 37, at 286-88.

<sup>168</sup> FED. R. CIV. P. 4(f)(3).

<sup>169</sup> Advisory Committee's Notes, *supra* note 17, at 80.

<sup>170</sup> "A court may direct a special method of service not explicitly authorized by the international agreement if not prohibited by the agreement." *Id.*

<sup>171</sup> BORN, *supra* note 3, at 792 n.10.

no feasible alternatives exist. Courts differ, however, on how hard the plaintiff must try to serve process in compliance with foreign law before authorizing service under 4(f)(3). In *Graval*, the court ordered the plaintiff to serve an Indonesian defendant by a letter of request despite the plaintiff's assertions that such method would be futile.<sup>172</sup> The court required the plaintiff to show an "earnest effort" to serve in compliance with foreign law.<sup>173</sup> Such interpretation of Rule 4(f)(3) is consistent with the Advisory Committee notes to Rule 4(f)(2), which state that service of process in violation of foreign law is not generally authorized.<sup>174</sup> If a plaintiff seeks an order for special service on a Russian defendant in the court that adopts this approach, service by letter of request will be unavoidable. Such an outcome may cause problems in diversity actions where under the state law the tolling of the statute of limitations commences when the summons is served.<sup>175</sup> If service by letter of request takes a long time, the statute of limitations may never be tolled.<sup>176</sup>

Other courts allow service under Rule 4(f)(3) upon a showing that the plaintiff made a diligent, but unsuccessful effort to locate the defendant.<sup>177</sup> For example, in *In Re Int'l Telemedia Assoc.*, the court retroactively approved service by electronic mail after the plaintiff made several unsuccessful attempts to determine the defendant's new telephone number and address.<sup>178</sup> According to the court, the defendant was "a moving target," virtually impossible to serve.<sup>179</sup> The court held that Rule 4(f)(3) was devised to provide courts with flexibility and discretion in dealing with service of process in foreign countries.<sup>180</sup> Similarly, in *Federal Home Loan Mortgage Corp. v. Mirchandani*, the court upheld orders of service by publication and through the defendant's attorney on an Indian defendant residing at an unknown address.<sup>181</sup> It is possible that a court that adheres to this approach will conveniently order service by mail, fax, or e-mail upon a showing that service in Russia by letter of request will be ineffective. It is worth noting, however, that in cases that have allowed such methods, the defendants had

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<sup>172</sup> *Graval v. P.T. Bakrie & Bros.*, 986 F. Supp. 1326, 1330 (C.D. Cal. 1996).

<sup>173</sup> *Id.*

<sup>174</sup> Advisory Committee's Notes, *supra* note 17, at 79-80.

<sup>175</sup> *See, e.g., Proctor and Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 667 (W.D. Tenn. 1998).

<sup>176</sup> *Id.*

<sup>177</sup> *See, e.g., In re Int'l Telemedia Assocs.*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000).

<sup>178</sup> *Id.* at 718.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 719.

<sup>181</sup> *Federal Home Loan Mortgage Corp. v. Mirchandani*, No. 94 CV 1201 (FB), 1996 U.S. Dist. LEXIS, at \*11-12 (E.D.N.Y. Sept. 18, 1996).



assets in the United States that were used to satisfy the judgments against them. The realization that the judgment will be easily enforced may have swayed the courts to adopt a more flexible approach to service under Rule 4(f)(3).

Ideally, service under Rule 4(f)(3) in Russia should be used only when it will not be necessary to seek subsequent enforcement of the judgment,<sup>182</sup> because of the high probability that Russian courts will not enforce the judgment if service did not comply with Russian procedural rules.<sup>183</sup> On the other hand, service through letters of request also has substantial shortcomings, such as guaranteed delays and uncertainty as to whether the request will reach the appropriate court and will be successfully carried out.<sup>184</sup> U.S. counsel faced with this hard choice should obviously weigh their options carefully and consult Russian counsel before proceeding. Service by means of letters of request is probably the lesser of two evils since it had successfully been done in the past.<sup>185</sup> Moreover, even assuming that both options are equally inadequate, obtaining and enforcing a judgment entails higher litigation costs.

## VI. CONCLUSION

Although Rule 4(f) allows several methods of service abroad, U.S. parties may use only service by means of letters of requests under Rule 4(f)(2)(B) and service as directed by the district court under Rule 4(f)(3) to serve process in Russia. Because the Moscow Agreement, the only candidate for an "internationally agreed means" between the United States and Russia, is not applicable under Rule 4(f)(1), Rule 4(f)(1) cannot be used. Service in the manner prescribed by the law of the foreign country, authorized by Rule 4(f)(2)(A), cannot be utilized because Russian law does

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<sup>182</sup> Enforcement in a foreign country will not be necessary when the defendant has assets in the United States against which the judgment can be enforced. See *supra* Part II.C; Horlick, *supra* note 20, at 638.

<sup>183</sup> Under Russian law, service of foreign process must be carried out by means of letters of request only. See *supra* Part IV.C. Russian law unequivocally provides that a court may refuse to recognize or enforce a foreign judgment if there are grounds to believe that the defendant had not been notified of the proceedings "in due time and in a proper way." Decree of the Presidium of the Supreme Soviet of the U.S.S.R. No. 9131-XI of June 21, 1988 on the Recognition and Execution in the U.S.S.R. of the Decisions of Foreign Courts of Law and Arbitration, available at LEXIS, Garant-Service. There are, however, no provisions dealing with a situation when the defendant received an actual notice, but the manner of service did not comport with Russian law. It is doubtful that a Russian court would enforce a judgment in this situation, since courts of many civil law countries do not recognize foreign judgments unless service complied with national law. Jones, *supra* note 22, at 537.

<sup>184</sup> See *supra* Part IV.C.

<sup>185</sup> *Id.*

not allow service by private parties. For the same reason, U.S. litigants cannot carry out service by mail or personal delivery under Rule 4(f)(2)(C). Since letters of request must go through the diplomatic channel, it may take a long time before the Russian court carries out the request and the proof of service reaches the U.S. plaintiff. Nevertheless, service by means of letters of request has been successfully done in the past. If the defendant has no assets in the United States, it is a better option than service under Rule 4(f)(3), because the Russian court can refuse to enforce the judgment if service of process did not comport with Russian procedural rules.

